United States Court of Appeals

for the Second Circuit

MEMORANDUM

76-3085

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In Re

GANNETT CO., INC.,

Petitioner,

-vs-

HON. HAROLD P. BURKE, Judge of the United States District Court, Western District of New York,

THE UNITED STATES OF AMERICA,

LLOYD GEORGE PARRY,
GREGORY A. BALDWIN,
DEPARTMENT OF JUSTICE ATTORNEYS

and

JOHN R. PARRINELLO,
MICHAEL W. ROCHE,
DANIEL L. BOOKLESS,
DONALD R. DILENO,

Respondents.

B P/S

MEMORANDUM OF LAW IN SUPPORT OF THE PETITION FOR WRIT OF MANDAMUS OR WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

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JOHN R. PARRINELLO,
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Respondents.

STATEMENT

This proceeding, commenced pursuant to the All Writs Act, Section 1651(a), Title 28, United States Code, and Rule 21 of the Federal Rule of Appellate Procedure for United States Courts of Appeals, seeks to vacate and prohibit enforcement of the oral Order, made on or about December 8, 1976, by Hon. Harold P. Burke, Judge of the United States District Court for the Western District of New York,

sealing and closing the files in three pending criminal sections entitled United States v. Petrillo and Roche, United States v. Bookless, and United States v. Dileno ("the criminal sections"). The proceeding is before this Court by reason of the filing of a motion for leave to file a petition, and petition seeking the issuance of a writ of mandamus or writ of prohibition to the District Court.

FACTS

The proceeding arises out of the criminal prosecutions by respondents Lloyd George Petry and Gregory A. Baldwin, Department of Justice Attorneys associated with the Federal Organized Crime Strike Force, of respondents John R. Petrillo and Michael W. Roche (United States v. Petrillo and Roche, CR. 17-21), respondent Daniel L. Bookless (United States v. Bookless, CR. 17-545), and respondent Donald R. Dileno (United States v. Dileno, CR. 17-538) in the United States District Court for the Western District of New York, respondent Hon. Harold P. Burke, President. Petitioner, a mass media communications firm owned or two daily newspapers and a VHF television station in Rochester, New York, regularly reported and disseminated information about the criminal sections.

On or about October 12, 1972, respondent Dileno, a former postal project officer for Building Systems Postal

Corporation, of Cleveland, Ohio, was indicted for four counts of conspiracy and using interstate travel with the intent to distribute proceeds of illegal bribes. In essence, he was charged with taking $116,000 in bribes in return for awarding contracts to local Rochester, New York, businesses while he was project officer. Building Systems Housing Corporation was, at that time, the general contractor for several public housing projects in the City of Rochester the contracts for which totaled more than $35 million.

On or about November 3, 1975, respondent Bookless, a carpet salesman for Imperial Floor Fashions, Rochester, New York, was indicted for perjury arising out of his testimony before a Federal grand jury investigating the payment of alleged kickbacks to respondent Parrinello in connection with the aforementioned public housing construction contracts. Bookless was accused of lying about arrangements to provide free carpeting to respondents Dileno and Parrinello, and to Parrinello's law partner, John F. Redmond.

On or about December 20, 1975, Bookless was shot in the head at close range and apparently left for dead in his car. However, despite the wound, Bookless was able to drive himself to a hospital and eventually recovered.

On or about April 13, 1976, respondent John R. Parrinello, an attorney and former Vice Mayor and former member of the Rochester City Council, and respondent Michael W. Roche, also a former member of the Rochester City Council, were indicted for conspiracy, bribery and mail fraud in connection with alleged kickbacks from Building Systems Housing Corporation. They were charged with conspiring to defraud and extorting payments from Building Systems or its subsidiaries, by improperly utilizing their positions of trust in the City of Rochester government.

Petitioner and its reporters expended great amounts of time, effort and other resources in observing and reporting the investigation of the crimes alleged, as well as attending pre-trial proceedings in each of these criminal actions. These matters have generated enormous public interest, especially in view of the claims of misuse of public office by elected City officials and the overtones of organized crime involvement in the construction industry in the Rochester and western New York area, where petitioner publishes and disseminates news to the public.

On July 26, 1976, counsel for Parrinello orally requested the trial court, Hon. Harold P. Burke, to order the Government to provide him with a list of witnesses which the Government intended to call at trial.

On September 8, 1972, the government submitted a brief, entitled "Government's Answer to Defendant Perrinello's Demand for a Witness List," in opposition to the motion. It stated that witnesses scheduled to appear at the Perrinello and Rocque trial had expressed reluctance to testify based upon fear of economic and physical retribution. Two specific examples were set forth in the brief, including the names of several persons expected to be first witnesses. Also revealed therein, for the first time, was the fact that Perrinello had visited Bookless at the post office following the shooting.

On November 4, 1972, counsel for Perrinello submitted a letter reply to Judge Burke claiming that the government's position was "both false and extraordinarily prejudicial" to his client. On November 13, 1972, Judge Burke denied the Perrinello motion.

Both the government brief and the reply letter were apparently filed in the United States v. Perrinello and Rocque, and United States v. Bookless criminal files maintained by the United States District Court for the Western District of New York. However, neither document came to the attention of Defendant's Report until mid-November, 1972. Interestingly, on November 30, 1972, in The Democrat and Times-Union, and on December 1, 1972, in The Democrat and

Chronicle, the fact of filing and the substance contained in the documents was reported by petitioner's newspapers to the public.

Prior to publication of these articles, on November 29, 1976, a Times-Union reporter went to Judge Burke's office, displayed the Government brief and the Shaw letter to Judge Burke's secretary, Janet E. Mulley, and asked if those documents were supposed to be sealed from the public and the press. Mrs. Mulley said they were not sealed, and informed the reporters that the brief and the letter were duly filed public documents.

On December 8, 1976, reporters for both The Democrat and Chronicle and The Times-Union were informed that the Parrinello and Roche, and the Bookless files had been sealed on oral order of Judge Burke. To confirm the information, both reporters went to Judge Burke's chambers and asked Mrs. Mulley whether the files in those two criminal proceedings were sealed. Mrs. Mulley stated that, at the direction of Judge Burke, three criminal action files had been sealed and closed to public inspection. Upon questioning, she confirmed that Judge Burke had directed the Dileno file sealed, as well as the Parrinello and Roche, and Bookless files. When asked if there was a written order sealing the files, Mrs. Mulley stated that there was not.

She also stated that respondent Baldwin had submitted a written request to Judge Burke to seal the files, and that the Baldwin letter was also sealed in the file and unavailable for inspection.

Supervening Authorities by petitioner's attorneys

Peter has confirmed that the files in the criminal sections are indeed sealed and closed to the public and the press pursuant to the oral order of respondent Judge Burke.

POINT I

THE ORDER SEALING OFFICIAL JUDICIAL RECORDS UNCONSTITUTIONALLY DEPRIVES THE PUBLIC AND THE PRESS OF THEIR SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL.

The files in three criminal cases pending in the United States District Court for the Western District of New York have been ordered sealed and closed to the public and the press by respondent Judge Burke for no stated reason, and without notice, thereby transforming significant portions of pending criminal sections into secret pre-trial proceedings. It is submitted that the District Court has violated the constitutional and common law public trial rights of the general public and of the press, and has seriously curtailed subsequent First Amendment press freedom. The order should not be permitted to stand.

(A) <u>The Sixth Amendment right to a public trial accrues to the public and to the press as well as the defendant.</u>

The Public Trial clause of the Sixth Amendment to the United States Constitution declares:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial..."

Both Federal and State courts have repeatedly recognized the independent right of the public and the press to a public trial.

> "The right to a public trial is ... to protect as much the public's right to know what goes on when men's lives and liberty are at stake, for a secret trial can result in favor to as well as unjust prosecution of a defendant." <u>Lewis v. Peyton</u>, 352 F.2d 791, 792 (4th Cir. 1965).

> "Not only the defendant himself, but also the public at large has a vital stake in the concept of a public trial." <u>People v. Hinton</u>, 31 N Y 2d 71, 73 (1971), <u>cert. denied</u>, 410 U.S. 91 (1972).

Indeed, the trial process is significantly benefitted by its public nature. As stated by Mr. Justice Black:

> "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

* * *

> "... suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge, -- that judge will be at once indolent and arbitrary: how corrupt so ever his

> inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: *in comparison of publicity, all other checks are of small account*." *In Re Oliver*, 333 U.S. 257, 270-271 (1948). (Emphasis added)

Public trials:

> "...serve to instill a sense of public trust in our judicial process by preventing the abuses of secret tribunals as exemplified by the Inquisition, Star Chamber and *lettre de cachet* [citations omitted]." *People v. Hinton*, *supra*, 31 N Y 2d at 73.

The specific advantages which accrue to a judicial proceeding as a result of public attendance were discussed by the court in *United States v. American Radiator and Standard Sanitary Corp.*, 274 F. Supp. 790, 794 (W.D.Pa. 1967), *aff'd.*, 388 F.2d 201 (3d Cir. 1967), *cert. denied*, 390 U.S. 922 (1968), when it denied defendant's application for *in camera* proceedings:

> "The public notice of a judicial proceeding tends to improve the quality of testimony, first, by producing in a witness' mind a disinclination to falsify, and second, by securing the presence of other non-parties who may be able to furnish testimony to contradict falsifiers. . . . .
>
> "Other reasons, independent of evidential service, for proceeding publicly rather than privately in the law are (1) the participants, judge, jury and counsel, are moved to stricter conscientiousness in the performance of their duties; (2) persons not parties to the action may be affected by pending litigation and have a right to know what is going on; and (3) public attendance has an educative effect which can increase respect for law and provide confidence in judicial remedies."

Moreover, publicity concerning trials and judicial proceedings may bring forth witnesses, information or evidence relevant to ascertainment of the truth. Stamicarbon, N.V. v. American Cyanamid Co., 506 F. 2d 532, 541 (2d Cir. 1974); Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944). Apropos here is the often repeated maxim that the "search light of a trial which is open to the public serves as a restraint against the abuse of judicial power..." United States ex rel. Bennett v. Rundle, 419 F.2d 599, 606 (3rd Cir. 1969). See, also, In Re Oliver, supra, 333 U.S. at 270; Mtr. of New York Post Corp. v. Leibowitz, 2 N Y 2d 677, 682 (1957); People v. Jelke, 308 N.Y. 56, 62 (1954); 6 Wigmore, Evidence (3d. Ed.) § 1834.

That the attendance of the public and the press is crucial to the legitimacy of the criminal justice system was perhaps most dramatically asserted by the Supreme Court in Sheppard v. Maxwell, 384 U.S. 333 (1966). There, the Supreme Court was confronted with a situation in which a defendant's right to a fair trial had been seriously undercut by irresponsible publicity. Nevertheless, in formulating a series of potential remedies for such circumstances the Court specifically refrained from sanctioning a trial closed to the public or the press, declaring, at page 350:

> "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."

Thus it is that the right of the public and the press to a public trial has been recognized as being of constitutional dimension, wholly apart from any similar right of a criminal defendant:

> "A trial is a public event. What transpires in the courtroom is public property... There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire before it." Craig v. Harney, 331 U.S. 367,374 (1947).

That this right applies to the records filed in any proceeding as well as to the trial itself cannot be doubted. The policy underlying the public trial guarantee makes it applicable at all stages of trial, United States v. Sorrentino, 175 F. 2d 721 (3d Cir. 1949), including pre-trial, United States ex rel. Bennett v. Rundle, supra, 419 F. 2d 599, 606; and post-trial, Matter of Gannett Co., Inc. v. Mark, ___ A D 2d ___, 387 NYS 2d 336 (4th Dept. 1976); and to all exhibits and records adduced thereat, Ex parte Drawbaugh, 2 App. D.C. 404, 407 (1894); In re Midwestern

Milk Monopolization Litigation, 405 F. Supp. 118 (W.D. Mo. 1975); United States v. Mitchell, 386 F. Supp. 639 (D.C. D.C. 1975); Cf. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

(B) The Order of the District Court does not serve purposes more important than the right of the public and the press to a public trial.

As with many constitutional rights, contravening factors may on occasion and in certain limited situations be so compelling as to outweigh the right to a public trial. However, in the case at bar, the order of the District Court closing the records in the criminal actions does not serve purposes which under any circumstances can be held more important than the public trial right.

The public and the press have only been excluded from public trials to protect the safety of a secret agent who would have been imperiled by his public appearance or who would have been rendered useless as an agent in the future, United States ex rel Lloyd v. Vincent, 520 F. 2d 1272 (2d Cir. 1975), cert. denied 423 U.S. 937 (1976); People v. Hinton, supra, 31 N Y 2d 71; to preserve secret hijacker profiles, United States v. Clark, 475 F. 2d 240, 246-247 (2d Cir. 1973); to preserve courtroom decorum and order, United States v. Kobli, 172 F. 2d 919, 922 (3d Cir.

1949); United States ex rel. Orlando v. Fay, 350 F. 2d 967, 971 (2d Cir. 1965), cert. denied 385 U.S. 1008 (1966); to protect public morals, United States v. Kobli, supra; to protect the confidentiality of trade secrets, Stamicarbon N.V. v. American Cyanamid Co., supra, 506 F. 2d 532 (2d Cir. 1974); to protect national security, New York Times v. United States, 403 U.S. 713 (1971) (briefs were sealed - Pentagon Papers case); and to protect juveniles, Greise v. United States, 262 F. 2d 151 (9th Cir. 1958). Nevertheless, even in these limited circumstances, before a trial court may properly conclude that the public right to a public trial is outweighed by the public interest in closure, the court must conduct an evidentiary hearing or, at least, be able to take notice of indisputable facts to support its action. United States ex rel. Lloyd v. Vincent, supra, 520 F. 2d 1272, 1276; People v. Richards, 48 A D 2d 792 (1st Dept. 1975).

Closure orders must also be tailored to the least restrictive alternative possible. For example, only portions of the public may be excluded to preserve courtroom decorum, Unites States v. Kobli, supra, 172 F. 2d 919, 922; Lancaster v. United States, 293 F. 2d 519 (D.C. Cir. 1961), or to accommodate overflow crowds, People v. Pearl, 66 Misc 2d 502 (App. Term, 1st Dept., 1971). Moreover, in every

such case, closure must be limited to the exigencies of the situation. United States v. Ruiz-Estrella, 481 F. 2d 723, 725-726 (2d Cir. 1973); People v. Jelke, supra, 308 N.Y. 56; Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P. 2d 163 (Dist. Ct. App. 1956); see, also, Greise v. United States, supra, 262 F. 2d 151.

It has on occasion been suggested that the public and the press may be excluded from a trial to protect a defendant's right to a fair trial. The Supreme Court rejected this suggestion in Sheppard v. Maxwell, supra, 384 U.S. 333, and pointed instead to other alternatives open to the Court to protect the rights of the defendant without impinging upon the right of the public and press to attend the trial. Likewise, in Nebraska Press Asso. v. Stuart, ___ U.S. ___, 49 L. Ed. 2d 683 (1976), a case involving wide-spread news coverage by local, regional and national news-papers, radio and television stations of a murder in a small Nebraska town of 850 people, the Supreme Court stated:

> "...pretrial publicity -- even pervasive, adverse publicity -- does not inevitably lead to an unfair trial. The capacity of the jury eventually impanelled to decide the case fairly is influenced by the tone and extent of the publicity, which is in part, and often in large part, shaped by what attorneys, police, and other officials do to precipitate news coverage. The trial judge has a major responsibility." Id. at 695.
>
> See, also, Matter of Oliver v. Postel, 30 N Y 2d 171, 182-183 (1971).

Most these cases clearly indicate it that the "major responsibility" of the first judge, to avoid prejudice of a defendant's right of a fair trial, consists of selecting remedial measures from among a number of alternatives which do not violate the First and Sixth Amendment rights of a free press and the public. These alternatives include limitation on press movement in the courtroom, insulating witnesses from public exposure, continuing a case until the effect of publicity spaces, change of venue, extensive voir dire, sequestration of a jury, limited control of statements by parties, and, ultimately, new trials where necessary. The standards of Nebraska Press and Chapman in effect mandate that the trial closure of criminal judicial records to the press and public, since there is always an alternative, less restrictive, remedy available to the trial court to protect a defendant's fair trial right.

In Ohio, for example, the availability of a venue change is sufficient to deter every party, based upon the interest to exercise publicity, for the denial of public and press access:

> "[U]nder the provisions of Ohio law there is no reason for this state to be faced with the cumbersome issues of the instant

> case. The large geographical area of Ohio, the large number of separate judicial trial jurisdictions, the limited intensive circulation of newspapers and the limited in depth area coverage of television and radio stations, the law providing for change of venue to assure a fair and impartial trial..., gives the trial judge adequate power to protect the defendant's constitutional right to an impartial jury, and at the same time, to preserve inviolate the constitutional right of freedom of the press for the benefit of the public [emphasis supplied]." State ex rel. Dayton Newspapers, Inc. v. Phillips, 46 Ohio St. 2d 457, 351 N.E.2d 127, 133 (1976).

Similarly, in State ex rel. Beacon Journal Pub. Co. v. Kainrad, 46 Ohio St. 2d 349, 348 N.E. 2d 695, at 697, n. 1 (1976), it was said:

> "It is the view of the writer of this opinion that the rule established in this case assures that there need not be a restraint or abridgement of freedom of the press in this state in a criminal case. The geography of Ohio, the judicial organization, the limited intensive coverage of the press and other media, the law and alternative measures available within the power of the court are such that the defendant's Sixth Amendment rights to a fair trial can be protected by the court and the First Amendment right to freedom of the press can be guaranteed at the same time." (Emphasis supplied)

The rationale of these cases is directly applicable here.

(C) There is no tenable rationale for the order of the District Court.

The Order herein falls within none of the exceptions to the public trial right, does not achieve its

intended purposes, and ignores alternative remedies which would achieve its purposes with significantly less impact upon the constitutional and common law rights of petitioner. Ostensibly, the closure Order was rendered to minimize potential harassment or embarrassment of probable witnesses for the Government. Such a rationale is untenable.

It should be observed that the purpose apparently to be served by the Order is moot since the papers submitted in the criminal actions have already disclosed publicly the identity of the witnesses who purportedly are available to testify and who fear reprisals. These papers, placed into the public record at a time when it was readily available to petitioner, were published and made public and, thus, the closure order is akin "to closing the barn door after the horse has gotten out."

More significantly, the Order, if allowed to stand, sets a dramatic and ominous precedent. All criminal proceedings involve allegations made by prosecution witnesses against criminal defendants. If the apparent reasoning underlying the order is that every time a witness fears a criminal defendant, the records of the criminal matter shall be closed, will there often be records that are kept open to public scrutiny and inspection? Taking the order to its ultimate logical conclusion, all judicial records in all

criminal trials would be closed to the public and the press until such time as the defendants were convicted, incarcerated, and no longer pose a possible physical threat.

To suggest, as apparently the rendering of this Order does, that public scrutiny of judicial records should be delayed until after the conclusion of the trial, at the earliest, ignores the fundamental importance of immediate public review of judicial proceedings. As Mr. Justice Black stated:

> "It must be recognized that public interest is much more likely to be kindled by the event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion.
>
> * * *
>
> "This unfocused threat is, to be sure, limited in time, terminating as it does upon final disposition of the case. But this does not change its censorial quality. An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgment of expression..." Bridges v. California, 314 U.S. 252, 268-69 (1941).
>
> See, also, Nebraska Press Asso. v. Stuart, 49 L.Ed. 2d 683, 698-699, supra;
>
> Miami Herald Pub Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J. concurring);

Carroll v. Princess Anne, 393 U.S. 175, 182 (1968);

Wood v. Georgia, 370 U.S. 375, 392 (1962);

Pennekamp v. Florida, 328 U.S. 331, 346-347 (1946).

To conclude that the case at bar falls within the purview of the exception to the public trial requirement carved out in United States ex rel. Lloyd v. Vincent, supra, 520 F. 2d 1272, would be a grave error. There, two Nassau County undercover police officerswere permitted to testify at trial in a courtroom closed to the public and the press. The time span of their testimony was brief. Here, the restraint imposed on petitioner is continuing, not for a day or even a week, but for an indefinite time measurable in months, and possibly forever. Moreover, unlike the undercover officer in Lloyd, the identity of the witnesses herein must ultimately be revealed for they will have to appear in court and confront the defendants. No exception gives them any right not to do so.

In addition, there is no way that Judge Burke could have concluded, without an evidentiary hearing, as did the trial court in Lloyd, that the lives of the witnesses in the criminal actions would be in peril if revealed. Compare Lloyd, supra, 520 F. 2d at p. 1275. Moreover, were it

actually true that the lives of the witnesses in the criminal cases are threatened, the Government need not have put their names in the brief submitted in opposition to the motion by Parrinello. Indeed, the Government could have placed the witnesses under protective security and guaranteed their continuing safety. See Pub. L. 91-452, Title V, §§ 501-504.

In sum, the exceptions to the requirement of public trials are narrowly defined and apply only when a strong showing has been made that no less odious alternatives are available to achieve the desired objectives. The Order herein imposes a complete bar on access to judicial records forming the basis for three criminal prosecutions. It prevents a studied review by petitioner's reporters of background materials, legal motions and positions often so necessary to an understanding of the theory of the prosecution or defense, and sometimes determinative of the actions altogether. Before such drastic steps as those taken here may be made:

> "It has always been recognized that any claim of practical justification for a departure from the constitutional requirement of a public trial must be tested by a standard of strict and inescapable necessity." United States ex rel. Bennett v. Rundle, supra, 419 F.2d at 607.

No such showing has been made in this case.

POINT II

THE ORDER OF THE DISTRICT COURT IS A PRIOR RESTRAINT, AND AN UNJUSTIFIABLE INFRINGEMENT UPON PROTECTED PRESS FREEDOMS.

(A) Unconstitutional Prior Restraints.

In Griswold v. Connecticut, 381 U.S. 479, 482-483 (1965), the Supreme Court declared:

> "...the state may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read ... and freedom of inquiry, freedom of thought and freedom to teach ... -- indeed the freedom of the entire university community... Without those peripheral rights the specific rights would be less secure."

The Order of Judge Burke closing the judicial records herein was directly aimed at the press and at pretrial publicity. As best as can be determined, its immediate purpose was to prohibit public dissemination of the content of what are ordinarily duly filed public documents. The closure Order of Judge Burke, aimed specifically at the news media, is an attempt to do indirectly what cannot be done directly; it is a prior restraint upon the publishing power of the press, even more insidious than more traditional "gag orders" in that it wholly prohibits access to news. Unlike the "gag orders" struck down as unconstitutional in Nebraska Press Association v. Stuart, supra, 49

L.Ed. 2d 683, the Order at bar indefinitely, if not completely, eliminates from the press and from the public domain knowledge of the events which may form a basis for decision in the criminal actions. Accordingly, the Order is an even greater infringement upon First Amendment values and must fall.

As stated by the majority of the Supreme Court in Nebraska Press Asso. v. Stuart, supra:

> "...prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.
>
> * * *
>
> "A prior restraint ... has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time.
>
> "The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment.
>
> * * *
>
> "...the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it." Id. at 697-699.

Indeed, a majority of the Supreme Court Justices in Nebraska Press Asso. indicated, in three separate concurring opinions, that if pressed by a more difficult case they

might well have adopted an absolute rule against prior restraint of the press under any circumstances. Brennan, J., concurring in the judgment, with whom Stewart and Marshall, JJ., concurred at p. 705; White, J., concurring at p. 704; Stevens, J., concurring at p. 731.

Less than three weeks after the Nebraska Press Asso. determination, on July 19, 1976, the Fourth Circuit Court of Appeals decided In re Washington Post Company, Docket Nos. 76-1695, 1698, 1699, 1711, (annexed hereto as Appendix "A"), a case exactly the same as one at bar. The order entered there, issued a writ of mandamus to the District Court conducting the publicity-rich criminal trial of Maryland Governor Mandel, reads as follows:

> "On July 2, 1976, we stayed the order of the district court entered in United States v. Mandel, Criminal No. P-75-0822 which order directed the Clerk to seal all papers filed after June 17, 1976. We have now carefully considered the responses that have been filed and have concluded that the order of the district court is an unnecessary prior restraint on freedom of the press in violation of the First Amendment to the Constitution of the United States.
>
> "It is accordingly ORDERED, ADJUDGED and DECREED that the United States District Court at Baltimore for the District of Maryland vacate its order entered on June 18, 1976, in No. P-75-0822 which order directed Mr. Schlitz, the Clerk of the Court, to place all

> subsequent filings in United States v. Mandel under seal. The Clerk of our court will immediately issue the appropriate writ of mandamus."

Even more recently, the New York Appellate Division, Fourth Department, in a case brought by the petitioner herein, Matter of Gannett Co, Inc. v. DePasquale, ___ A D 2d ___ (slip opn, dtd. 12/17/76, attached hereto as Appendix "B"), held that:

> "Where an exclusionary order is directed at the press to prevent the publication of material ..., First Amendment rights are abridged to the same degree as in the case of a "gag order" directing the press not to publish asserted prejudicial information." (Slip opn., p. 6).

In that case, the trial court had excluded the press from a pre-trial confession suppression hearing due to the reasonable probability of prejudice to the defendants inherent in conducting an open proceeding in a sparsely populated upstate New York county. Noting that the possibility feared by the trial court existed, the Appellate Division nevertheless stated, at p. 6, that the purpose of the order "unmasks it as a substitute for a gag order that would otherwise place a direct restraint on the right of the press to publish."

The Court proceeded to comment that:

> "Prior restraint on speech and publication is 'the most serious and least tolerable infringement on First Amendment rights' (Nebraska Press Assn. v. Stuart, ____ US

> ____, 96 S. Ct. 2791, 49 L. Ed. 2d 683, 697). '[O]nly the most exigent circumstances warrant the issuance of an order curtailing the right of the press to publish. All other measures within the power of the court to insure a fair trial must be found to be unavailing or deficient' (New York Times v. Starkey, 51 A D 2d 60, 64). The reviewing court must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pre-trial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pre-trial publicity; (c) how effectively a restraining order would operate to prevent the threatened danger. The reviewing court should then consider whether the record supports the entry of a prior restraint on publication (Nebraska Press Assn. v. Stuart, supra, 49 L. Ed. 2d at 699)." (slip opn., pp. 6-7).

Application of these standards to the order of the District Court makes clear that the "heavy burden imposed as a condition to securing a prior restraint" has not been met here. Nebraska Press Asso. v. Stuart, supra, at p. 704. Judge Burke made no findings, as he held no evidentiary hearing, with regard to the nature and extent of pre-trial news coverage. He did not inquire into whether other measures would mitigate the effects of unrestrained pre-trial publicity. Nor did he attempt to ascertain whether, or indeed how, effectively the exclusionary order would work to prevent the preceived threat. See, Nebraska Press Asso., supra, at pp. 699-702. Accordingly, there is no record here upon which the Order barring the public and press from access to judicial records could have been properly based.

(B) Unconstitutional infringement upon protected news gathering rights.

The Order herein is not only an indirect attempt to muzzle the press but, moreover, to the extent that it restricts access of the press to judicial sources of information, it is violative of the First Amendment.

In a recent case, in which a trial court excluded the public and press from a suppression hearing at the request of a defendant, the Supreme Court of Ohio determined that foreclosure of news sources, such as that effected by Judge Burke here, is a direct abridgement of freedom of the press:

> "This case deals with the right of a newspaper to observe and publish a report of what happens at a judicial proceeding in a criminal case.
>
> "A Court order which denies that right has the force of law. There can be no dispute about the fact that such an order abridges the freedom of the press...." State ex rel. Dayton Newspapers, Inc. v. Phillips, 46 Ohio St. 2d 457, 351 N.E. 2d 127, 130 (Ohio 1976).

The apparent contradiction between protecting the right of the press to disseminate information without to some extent protecting its right to gather news was recognized in dictum by the Supreme Court in Branzburg v. Hayes, 408 U.S. 665 (1972), where it was stated:

> "We do not question the significance of free speech, press, or assembly to the

country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.

* * * * * *

"Finally, as we have earlier indicated, news gathering is not without its First Amendment protections. . ." (Emphasis supplied)" (pp. 681, 707).

In his dissent, Mr. Justice Stewart declared:

"A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated. We have, therefore, recognized that there is a right to publish without prior government approval [citations omitted], and a right to receive printed matter [citation omitted].

"No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information, the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist [Emphasis supplied]." (Id. at pp. 727-28).

See, also, In re Washington Post Company, supra;

cf. Lewis v. Baxley, 368 F. Supp. 768, 775-76. (M.D. Ala. 1973).

Again, where parties to the civil action arising from the National Guard shootings at Kent State in 1970 were precluded by court order from discussing the cases with the

news media or the public, the Court reversed, citing First Amendment protection for news-gathering:

> "...[T]he order ... in denying to petitioner access to potential sources of information, at least arguably impairs rights guaranteed to the petitioner by the First Amendment.
>
> ... [I]ts ability to gather the news concerning the trial is directly impaired or curtailed. The protected right to publish the news would be of little value in the absence of sources from which to obtain it...." Columbia Broadcasting System, Inc. v. Young, 522 F.2d 234, 237-38 (6th Cir. 1975).

It is therefore clear that, at least in the context of access to judicial records the right of the press to acquire information is guaranteed not only by the Sixth Amendment, but by the First Amendment as well. Thus, whether the Order herein be conceptualized as an indirect restriction upon dissemination of news by the press, or a direct restriction upon the gathering of news by the press, it nevertheless violates First Amendment press freedoms.

POINT III

THE ORDER OF THE DISTRICT COURT VIOLATES DUE PROCESS OF LAW.

In addition to its substantive unconstitutionality, the Order herein was issued in a manner so deficient as to have deprived petitioner of its First and Sixth Amendment rights without due process of law. As indicated previously, there is serious question as to whether potentially

unfavorable pre-trial publicity can ever justify secreting judicial records. Nevertheless, it is well established that whenever a trial court wishes to deny access to judicial records to the press for any reason, it must first comply with a number of constitutionally-mandated procedural requirements.

First, adequate notice of an impending order must be given to all involved parties -- including representatives of the press and other interested media. United States v. Schiavo, 504 F.2d 1, 8, 14 (3d Cir. 1974) (en banc), cert. denied, 419 U.S. 1096 (1975); Matter of New York Times v. Starkey, supra, 51 A D 2d at 64-5; State of Florida ex rel. Miami Herald Publishing Company v. McIntosh, ____ So.2d ____ (Fla. Sup. Ct. 1976) (slip. opn., dtd. July 30, 1976, annexed hereto as Appendix C, at p. 9). No such notice was ever given petitioner.

Secondly, an evidentiary hearing, adversary in nature, must be held to supply a factual basis for any proposed order. United States v. Schiavo, supra, 504 F.2d at 8, 14; Matter of Gannett Co., Inc. v. DePasquale, supra, ____ A D 2d ____, at p. 7-8; People v. Morales, 53 A D 2d 517 (1st Dept. 1976); Matter of New York Times v. Starkey, supra, 51 A D 2d at 65; State of Florida ex rel. Miami

Herald Publishing Company v. McIntosh, supra, at p. 9. No such hearing was held herein.

Moreover, particular findings of fact, based upon evidence adduced at the hearing, must be made which support any proposed order. Such findings must include: (a) a description of the nature and extent of the injury which will arise should the records remain open; (b) particular determinations why individual alternative measures, less drastic than denial of access, would not cure any potential prejudice; and (c) a particular determination concerning the effectiveness of the order to be issued. Nebraska Press Asso. v. Stuart, supra, 49 L.Ed. 2d at 699-702; United States v. Schiavo, supra, 504 F.2d at 14 (Adams, Givvons, Garth, JJ., concurring); Matter of Gannett Co., Inc. v. DePasquale, supra, ____ A D 2d ____, at p. 7-8; Matter of New York Times v. Starkey, supra, 51 A D 2d at 65; People v. Morales, supra, 53 A D 2d at 517. No such findings were ever made herein.

Continuing, the order ultimately issued must be reduced to written form and entered on the court docket. United States v. Schiavo, supra, 504 F.2d at 6. No written order was ever signed or entered on any court docket, at least insofar as petitioner has been able to ascertain.

Finally, the terms of any order ultimately issued must be narrowly drawn. Nebraska Press Asso. v. Stuart, 49

L.Ed. 2d at 703. Clearly, Judge Burke's denial of access to the judicial records herein in perpetuity or, at least, indefinitely, is an overbroad sanction, as of course is the closure itself.

In light of the foregoing, it is clear that the order of Judge Burke did not afford petitioner the procedural rights to which it is entitled, and cannot stand. The damage done petitioner, and to the public at large, is irreparable and substantial.

Moreover, the manner in which the press has been injured here is of critical import, for petitioner has been forced to assert and protect, in an original proceeding -- with all its procedural, temporal and financial hurdles -- its fundamental constitutional rights. In effect, the Order below shifted an extremely heavy burden onto petitioner which it had -- in this instance -- the resources to bear. However, there are obviously a substantial number of small newspapers extant in upstate New York, which could not financially afford to follow the path trod by petitioner herein:

> "Small town dailies ... are not read in the White House, the Congress, the Supreme Court or by network news executives. The causes for which [they] contend and the problems [they] face are invisible to the world of power and intellect. [They] have no in-house

> legal staff [,] retain no great, national law firms. [They] do not have spacious profits with which to defend [them]selves and [their] principles, all the way to the Supreme Court, each and everytime [they] feel them to be under attack.
>
> "[Their] only alternative is obedient silence.... Who will notice if [they] are silenced? The small town press will be the unknown soldier of a war between the First and Sixth Amendments, a war that should never have been declared, and can still be avoided." Nebraska Press Asso. v. Stuart, supra, 49 L. Ed. 2d at 728, n.40 (Brennan, Stewart, Marshall, JJ., concurring and citing amicus brief).

Because of the potentially recurring danger that a denial of access order such as the one at bar presents to persons and to media organizations financially unable to seek reversal of such orders in their own right, expeditious and complete vacatur of the Order herein is warranted.

POINT IV

THE ORDER OF THE DISTRICT COURT IS CONTRARY TO THE WELL-ESTABLISHED COMMON LAW RIGHT OF ACCESS TO JUDICIAL RECORD

The right of access to judicial records was well-established in the Seventeenth Century. As 1 Greenleaf on Evidence [16th Ed.], § 471, states:

> "In regard to the inspection of public documents, it has been admitted, from a very early period, that the inspection and exemplification of the records of the king's courts is the common right of the subject. This right was extended, by an ancient

> statute, to cases where the subject was concerned against the king. The exercise of this right does not appear to have been restrained until the reign of Charles II, when, in consequence of the frequency of actions for malicious prosecution, which could not be supported without a copy of the record, the judges made an order for the regulation of the sessions at the Old Bailey prohibiting the granting of any copy of an indictment for felony without a special order upon motion in open court, at the general jail delivery. This order, it is to be observed, relates only to indictments for felony. In cases of misdemeanor, the right to a copy has never been questioned. But in the United States, no regulation of this kind is known to have been expressly made; and any limitation of the right to a copy of a judicial record or paper, when applied for by any person having an interest in it, would probably be deemed repugnant to the genius of American institutions."

Indeed, the validity of the order prohibiting copies of felony indictments was questioned by Lord Holt in Groenvelt v. Burrell, 91 Eng Reprint 1064, as reported in Anno., 175 ALR 1260, 1262.

The leading American authority upholding the common law right of access is Ex parte Uppercu, 239 U.S. 435 (1915). In that case it was held that mandamus would issue to enforce the right of any litigant to access of depositions or exhibits on file in another case, and could not be defeated by an order of the Court sealing such depositions and impounding such exhibits when neither the parties to the original proceeding nor the deponents possessed any privilege of nondisclosure.

The cases at common law are not to be distinguished on the ground that access is limited solely to litigants. Rather, that factor formed the basis for granting relief and derived from the need of the common law courts to confer standing, albeit artificially, upon the plaintiff. In re Mosher, 248 F.2d 956, 958 (C.C.P.A. 1957); United States v. Mitchell, supra, 386 F.Supp. 639, 641 n. 2.

The rule was, and still is, that any member of the public has a right to inspect and obtain copies of judicial records. Ex parte Drawbaugh, 2 App D.C. 404, 407, supra; see, also, United States v. Burka, 289 A. 2d 276 (App. D.C. 1972); Belt v. Pr. George's County Abstract Co., 20 A. 982 (Ct. App. Md. 1890). As the Drawbaugh Court so aptly put it:

> "[A]ny attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access and to its records, according to long-established usage and practice". 2 App D.C. at pp. 407-408.

There is, therefore, established judicial recognition of the need to make available and preserve trial materials bearing on matters of general community interest or special legal attention. It follows that Judge Burke's order is contrary to this well-engrained common law precept. Accordingly, the Order herein cannot stand and should be vacated by this Court.

POINT V

PETITIONER IS ENTITLED TO RELIEF UNDER THE ALL WRITS STATUTE.

(A) Extraordinary relief is appropriate.

Petitioner is entitled to relief under the All Writs Statute, 28 USC §1651(a), whether the remedy would traditionally take the form of a writ of mandamus or a writ of prohibition. As The Supreme Court stated in Ex Parte Peru, 318 U.S. 578, 582-583 (1943):

> "The historic use of writs of prohibition and mandamus directed by an appellate to an inferior Court has been to exert the revisory appellate power over the inferior court. The writs thus afford an expeditious and effective means of confining the inferior Court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so." (citations omitted)

In the case at bar, both prohibition and mandamus are appropriate.

While the peremptory writs of prohibition and mandamus are extraordinary and their use has been strictly circumscribed, see Will v. United States, 389 U.S. 90, 95-96, 103-104, 107 (1967), as has their employment as a substitute for appeal, id. pp. 96-97; United States v. Weinstein, 452 F.2d 704 (2d Cir. 1971), cert. denied sub nom.

Grunberger v. United States, 406 U.S. 917 (1972), in instances where there is no avenue of appeal and there has been a clearly excessive exercise of judicial power, as is true here, mandamus or other extraordinary relief will lie. See, e.g., United States v. Smith, 331 U.S. 469 (1947); Ex parte State of New York, No. 1, 256 U.S. 490 (1921); United States v. Dooling, 406 F.2d 192, 198-199 (2d Cir.), cert. denied sub nom. Persico v. United States, 395 U.S. 911 (1969); United States v. Weinstein, 511 F.2d 622 (2d Cir. 1975); and cases cited, id. p. 626. As Professor Moore succintly states, the extraordinary writs "prevent district judges from embarking on frolics of their own." 9 Moore's Federal Practice (2d Ed.), § 110.28, p. 309.

That this proceeding fits precisely the mold cast for the issuance of an extraordinary writ is hardly debatable. In precisely the same factual setting, the Fourth Circuit Court of Appeals in In re Washington Post Company, supra, issued a writ of mandamus to the United States District Court for the District of Maryland. There, respondent Judge Platt had directed the District Court to seal all papers filed after June 17, 1976 in United States v. Mandel, Criminal No. P - 75 - 0822. After granting leave to the Government and the defendants in the criminal action to file responses to the application by petitioners Washington Post

Company and other media organizations, the Court of Appeals concluded that the District Court order constituted an unnecessary prior restraint on freedom of the press in violation of the First Amendment, and thus issued the writ of mandamus.

Likewise, in a somewhat analogous situation, In re New York News, Inc. v. Platt, ___ F.2d ___ (Docket No. 76 - 3038 [2d Cir. 1976]), this Court issued a writ of mandamus to the United States District Court for the Eastern District of New York, and ordered the opening, to the press and to the public, of the civil action brought by singer Connie Francis as a result of a rape which occurred in a motel. (Connie Francis Ganzilli v. Howard Johnson's Motor Lodge, Inc., 75 Civ. 979).

See, also, Miami Herald Pub. Co. v. Collazo, 329 So. 2d 333 (Fla. 3d Dist. Ct. App. 1976), where a settlement agreement in court between the City and an individual shot by police, involving allegations of police misconduct, was ordered unsealed; State of Florida ex rel. Gore Newspapers Company, 313 So. 2d 777 (Fla. 4th Dist. Ct. App. 1975) where it was held that prohibition was a proper remedy, that petitioning media organizations had standing, and that a writ of prohibition should be issued to require that divorce proceedings involving comedian Jackie Gleason be opened to the public and press.

As in each of the cited cases, petitioner herein is a media organization seeking access to papers officially filed in a criminal action, and seeking to indicate its right to broadcast the news of a public trial. Indisputably, the press has the right to report trial proceedings, and any order foreclosing the press from reporting such an event constitutes a direct, serious and unconstitutional infringement upon the right of a free press and a public trial guaranteed to this open and free society by the Federal constitution. Id., In re Oliver, supra, 333 U.S. 257, 270-272; Craig v. Harney, supra, 331 U.S. 367, 374. With respect to that right, only an extraordinary remedy can redress the excess of power which Judge Burke exercised in ordering the files sealed in each of the pending criminal actions.

Clearly, appeal in the criminal proceeding, while possibly availing to the defendants, would in no way redress the wrong done to petitioner and to the public at large. Moreover, extraordinary relief is particularly appropriate here, where delay in review of the order made herein until after the criminal proceedings have terminated, will effectively destroy the right asserted. Bridges v. California, supra, 314 U.S. 252, 268-269. Therefore, a writ of mandamus or a writ of prohibition is an appropriate remedy.

The proceeding is clearly distinguishable from those in which petitioners prematurely sought review of an order in a criminal case by way of an extraordinary collateral proceeding. Compare Hughes v. Thompson, 415 U.S. 1301 (1974); United v. Will, supra, 389 U.S. 90; Chesimard v. Gagliardi, 489 F.2d 271 (2d Cir. 1973); Stans v. Gagliardi, 485 F.2d 1290 (2d Cir. 1973); United States v. Griesa, 481 F.2d 276 (2d Cir. 1973); United States v. DiStefano, 464 F.2d 845 (2d Cir. 1972). Nor is this a case where the trial court has not had an opportunity to decide jurisdictional objections. State of Ohio ex rel. Williams v. Lambros, 512 F.2d 372 (6th Cir. 1975). Rather, this is a proceeding in the nature of prohibition and mandamus where there is no adequate remedy at law available at either the trial level or on appeal. See In re Washington Post Company, supra; United States v. Weinstein, 511 F.2d 622, supra; United States v. Lasker, 481 F.2d 229 (2d Cir. 1973); United States v. United States Dist. Court, 334 U.S. 258 (1948); State of Maryland v. Soper, 270 U.S. 9 (1926). The clear import of the constitutional and common law mandates of public trial and free press is that courts may not unreasonably curtail or restrict access by all persons to such documents. In acting so as to violate these mandates,

the District Court made itself subject to the issuance of an extraordinary writ by this Court.

(B) Petitioner Has Standing.

Petitioner submits it clearly has standing to assert its own right and the right of the public generally to have the trials, and records of the trials, in their Courts conducted in public. This right exists at common law, Ex parte Uppercu, supra, 239 U.S. 435, and under the Constitution. Nebraska Press Asso v. Stewart, supra, 49 L. Ed. 2d 683; Sheppard v. Maxwell, 384 U.S. 333, supra. While it is true that some early cases required one to have a personal "legitimate interest" in judicial records before access would be granted, see Nowack v. Fuller, 243 Mich. 200 (1928); anno., 175 ALR 1260, 1266-1267 (1948), the requirement was simply to provide a basis for standing where access had been wrongfully denied, see United States v. Mitchell, supra, 386 F. Supp. 639, at a time when Frothingham v. Mellon, 262 U.S. 447 (1923), was considered jurisprudentially sound. Today, it is clear that every member of the public has a personal stake in the outcome of a controversy which will determine whether or not he will have an opportunity to be informed of a matter which is concededly of public importance.

That the First Amendment guarantee of freedom of the press was intended to protect the reading public at least as much as the publishing press is an idea that no longer can be disputed. In LaMont v. Postmaster General, 381 U.S. 301 (1965), for instance, an ordinary member of the public successfully challenged under the First Amendment a statute construed to give censorship powers to the Postmaster General with respect to communist political propaganda sent into this country from abroad. Thereafter, further reinforcing the immutability of the concept, the United States Supreme Court held the Sixth Amendment applicable to the states, Duncan v. Louisiana, 391 U.S. 145 (1968), and overruled Frothingham v. Mellon, supra, in Flast v. Cohen, 392 U.S. 83 (1968), holding that where a party has a "personal stake in the outcome of the controversy," he has standing. Id. p. 99; Data Processing Serv. v. Camp, 397 U.S. 150, 152 (1970). Thus it is that in recent years the press has been regularly granted standing, generally as a matter of course. See, e.g., In re Washington Post Company, supra; Columbia Broadcasting Systems, Inc. v. Young, supra, 522 F.2d 234; State ex rel Gore Newspaper Company v. Tyson, supra, 313 So. 2d 777; Oxnard Publishing Co. v. Superior Court of Ventura County, 68 Cal. Rptr. 83 (Ct. App. 1968).

Petitioner also submits that it has standing to bring this proceeding under Data Processing Serv., supra,

because it has suffered injury in fact within a constitutionally protected zone of interest. The injury in fact to petitioner arises from the interference with the exercise of its business as a mass communicator to the public and its ability to report on criminal proceedings. Petitioner has already expended substantial resources in attending and reporting the proceedings in the criminal actions. The closing of the files in these matters will prevent petitioner from recording the events thereat in a complete and accurate manner, effectively foreclosing to that extent the exercise of its business. That a closure order constitutes an act injurious to a mass communicator sufficient to confer standing has been recognized by this very Court. In re New York News, Inc. v. Platt, supra, ___ F.2d __; see also, In re Washington Post Company, supra; Matter of Oliver v. Postel, 30 N Y 2d 171 (1972).

CONCLUSION

For the reasons stated, petitioner Gannett Co., Inc. respectfully requests that its Petition be granted, in an expeditious manner, and that this Court issue a writ of mandamus or writ of prohibition to the United States District Court for the Western District of New York, directing that Court to unseal and make open and available to the public and petitioner the official judicial records and files in United States v. Parrinello and Roche (Cr. 76-51), United States v. Bookless (Cr. 75-245), and United States v. Dileno, (Cr. 75-238).

Dated: December 29, 1976

NIXON, HARGRAVE, DEVANS & DOYLE

By: John B. McCrory
John B. McCrory
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Frank H. Penski,
On the Memorandum.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-1695

In re

THE WASHINGTON POST COMPANY,
POST-NEWSWEEK STATIONS,
CAPITAL AREA, INC.,
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS,
RADIO-TELEVISION NEWS DIRECTORS
ASSOCIATION,
SOCIETY OF PROFESSIONAL JOURNALISTS
(SIGMA DELTA CHI), MARYLAND
PROFESSIONAL CHAPTER,

Petitioners.

No. 76-1698

In re

THE A. S. ABELL COMPANY,

Petitioner.

No. 76-1699

In re

THE HEARST CORPORATION
(BALTIMORE NEWS-AMERICAN,
WBAL-TV, and WBAL RADIO
DIVISIONS),

Petitioner.

No. 76-1711

In re

WESTINGHOUSE BROADCASTING
COMPANY, INC.,

Petitioner.

WRIT OF MANDAMUS

On July 2, 1976, we stayed the order of the district court entered in United States v. Mandel, Criminal No. P-75-0822 which order directed the Clerk to seal all papers filed after June 17, 1976. We granted leave to the government and the defendants to file responses to the applications for a writ of mandamus on or before July 12, 1976. We have now carefully considered the responses that have been filed and have concluded that the order of the district court is an unnecessary prior restraint on freedom of the press in violation of the First Amendment to the Constitution of the United States.

It is accordingly ORDERED, ADJUDGED and DECREED that the United States District Court at Baltimore for the District of Maryland vacate its order entered on June 18, 1976, in No. P-75-0822 which order directed Mr. Schlitz, the Clerk of the Court, to place all subsequent filings in United States v. Mandel under seal. The Clerk of our court will immediately issue the appropriate writ of mandamus.

Done with the concurrences of Judge Butzner and Judge Widener, this 19th day of July, 1976.

United States Circuit Judge

A True Copy, Teste:
William K. Slate, II, Clerk
By _____
Deputy Clerk

APPENDIX A

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS

SUPREME COURT
APPELLATE DIVISION

STATE OF NEW YORK
FOURTH DEPARTMENT

In the Matter of the Application of Gannett Co., Inc., Petitioner,

-vs-

#915/1976

Hon. Daniel A. DePasquale, as Judge of the Seneca County Court, Kyle Edwin Greathouse, David Ray Jones and Walter J. Ward, as District Attorney of Seneca County, Respondents.

ARGUED: December 6, 1976
DECIDED: December 17, 1976

PRESENT:

HON. REID S. MOULE, Justice Presiding

HON. RICHARD D. SIMONS,
HON. MICHAEL F. DILLON,
HON. HARRY D. GOLDMAN, Associate Justices

Article 78 proceeding in the nature of prohibition to vacate orders excluding public and press from a hearing.

APPEARANCES:

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(Alan Marrus, Esq., of counsel)

WALTER J. WARD, ESQ.
District Attorney
32 Fall St.
Seneca Falls, New York 13148
Respondent
(Alan Marrus, Esq., of counsel)

PER CURIAM:

Petitioner Gannett Co., Inc. seeks an order of prohibition pursuant to CPLR article 78 vacating and prohibiting enforcement of two orders of the Seneca County Court which excluded the public and press from a pretrial Huntley hearing in a criminal prosecution involving two defendants charged with murder.

Petitioner owns and operates two daily newspapers and one television station in the Rochester area. In the course of its news reporting activities petitioner assigns reporters to cover criminal proceedings that are expected to generate interest among the general public. People v. Kyle Edwin Greathouse and Davis Ray Jones is one such proceeding currently in the pretrial stage in Seneca County. Defendants Greathouse and Jones were indicted for the crimes of murder, robbery and larceny. It was alleged in the indictment that Greathouse and Jones robbed and murdered a fishing companion and dumped the victim's body into Seneca Lake. Thereafter the defendants fled the jurisdiction and were eventually arrested in Michigan. Subsequently they were returned to New York to face criminal charges. The case against the defendants is somewhat unique in that the alleged victim's body had not been recovered when the indictments were returned, and the record indicates that the corpus of the alleged victim is still missing. Another unusual circumstance is that one of the defendants is sixteen years old.

The defendants subsequently filed a motion pursuant to CPL article 710 to suppress certain statements attributed to them. The Huntley hearing was conducted before Hon. Daniel A. DePasquale, Seneca County Court Judge, who

ordered that the hearing be closed to the public and press upon the request of the defendants. In the first order the court gave as its reasons for closure that the Huntley hearing "is not the trial of the matter. Certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendant, and for those reasons the Court is going to grant both motions". During the hearing petitioner sought a postponement to argue its right to be present and to have access to transcripts of the completed portion of the hearing. Petitioner's request was denied and the hearing remained closed. Thereafter petitioner moved to vacate the closure order nunc pro tunc and for immediate access to the completed stenographic transcripts of the suppression hearing. The County Court once again denied the relief requested "on the theory that under the special and unusual circumstances - one of these two defendants being 16 years of age - that there was a reasonable probability of prejudice to the defendants, and the Court therefore found it necessary to grant the motion". Petitioner is now seeking to vacate and prohibit enforcement of both the oral order of closure and the subsequent written order which denied petitioner's motion to vacate the closure order nunc pro tunc and for immediate access to the transcripts of the hearing.

This proceeding presents a basic conflict between petitioner's First and Sixth Amendment right to attend criminal proceedings and publish information with regard thereto and the constitutional right of the defendants to receive a fair trial before an impartial jury. The issue is whether the public and representatives of the news media may be excluded from a pretrial suppression hearing concerning the voluntariness of alleged confessions and admissions on the ground that an open hearing would create a reasonable probability of prejudice to the defendants.

The accused in a criminal prosecution has a constitutional right to a public trial (U. S. Const., 6th Amdt.; Duncan v. Louisiana, 391 US 145; see also, Matter of Oliver v. Postel, 30 NY2d 171; Judiciary Law, §4; Civil Rights Law, §12). But the public trial guarantee does not inure to the benefit of the accused alone. The public has a vital interest in open judicial proceedings, especially criminal proceedings, to insure that the integrity of the judicial process remains intact. Public trials "serve to instill a sense of public trust in our judicial process by preventing the abuses of secret tribunals as exemplified by the Inquisition, Star Chamber and lettre de cachet" (People v. Hinton, 31 NY2d 71, 73; United States ex rel. Lloyd v. Vincent, 520 F2d 1272, cert den 423 US 937). "The searchlight of a trial which is open to the public serves as a restraint against the abuse of judicial power ***" (United States ex rel. Bennett v. Rundle, 419 F2d 599, 606; Matter of Oliver, 333 US 257, 270; People v. Jelke, 308 NY 56, 62). "A trial is a public event. What transpires in the courtroom is public property" (Craig v. Harney, 331 US 367, 374).

Precisely because "the public at large has a vital stake in the concept of a public trial" (People v. Hinton, supra, at 73), the circumstances under which a trial court may order closure have been closely circumscribed. Closure is permitted only in "unusual circumstances" (People v. Hinton, supra) or upon a clear showing that such an order is required to prevent "a serious and imminent threat to the integrity of the trial" (Matter of Oliver v. Postel, supra, citing Craig v. Harney, 331 US 367, 373, 377, supra; see, Matter of Hearst Corp. v. Cholakis, ____AD2d ____, dec. September 9, 1976). A closed trial order "constitutes an exception to the general rule requiring open judicial proceedings *** and may only

be employed as a response to compelling factual circumstances. The discretionary judgment which bars the doorway to a courtroom must be 'sparingly exercised and then, only when unusual circumstances necessitate it' (People v. Hinton, 31 N.Y.2d 71, supra; *** People v. Devine, 80 Misc.2d 641)"(Gannett Co., Inc. v. Mark, ____AD2d _____, 387 NYS2d 336, 339). An exclusionary order must be supported by a factual showing of prejudice to the defendant (Matter of Hansen v. Kelly, 38 AD2d 722). Where no showing of prejudice has been made, an order closing the courtroom is inappropriate and must be vacated (Matter of Hearst Corp. v. Cholakis, supra). The guiding principle is that a court is a public facility from which the public and press cannot be excluded except when there is a showing of a compelling reason for such action(Gannett Co., Inc. v. Mark, supra). _____

The exclusionary order entered by the County Court is not supported by a showing of compelling factual circumstances. Respondent DePasquale indicated that the reason for closure was the reasonable probability of prejudice to the defendants. The only factual reason given is that one of the defendants is sixteen years of age. There is no further reason given. No finding was made concerning the extent of pretrial coverage in the case, the impact which the disclosures would be expected to produce, the size of the prospective jury pool in Seneca County nor as to any other matter that would indicate with a reasonable amount of certainty that the defendants could not receive a fair trial in Seneca County without a closed Huntley hearing. The closure order entered here lacks the requisite factual basis necessary to overcome the right of the public and press to open judicial proceedings.

There is a second infirmity in the County Court order which overshadows the right of the public to open judicial proceedings. The exclusionary order entered here infringed petitioner's First Amendment rights in that it constituted a violation of the right of the press to publish free from unlawful governmental interference. It is clear that a closed trial order restricts media access to information ordinarily made available to the general public. By denying access to the media a trial judge can effectively prevent the publication of testimony or other information deemed prejudicial to the accused. It is this feature of the instant closed trial order that is attacked by petitioner as an infringement upon its First Amendment rights. Logic compels the conclusion that where an exclusionary order is entered merely as a substitute for a "gag order" which would otherwise place a direct restraint on what the press can publish, such exclusionary order infringes upon protected First Amendment rights. An exclusionary order is merely a substitute for a direct prior restraint where, as here, the sole purpose behind the order is to prevent the publication of what transpires in the courtroom during a pretrial hearing.

The fact that such an order "constitute[s] a novel form of censorship cannot insulate or shield it from constitutional attack" (Matter of Oliver v. Postel, supra, at 183). "In the area of 'indispensible' First Amendment liberties, the Supreme Court has been careful 'not to limit [their] protection *** to any particular way of abridging it' (Grosjean v. American Press Co., 297 US 233, 249; see, also, Communications Assn. v. Douds, 339 US 382, 402; N.A.A.C.P. v. Alabama,

357 US 449, 461), since 'abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.' (N.A.A.C.P. v. Alabama, 357 US 449, 461, supra.)". Where an exclusionary order is directed at the press to prevent the publication of material prejudicial to the defendant, First Amendment rights are abridged to the same degree as in the case of a "gag order" directing the press not to publish the asserted prejudicial information.

The County Court excluded the public and press from the Huntley hearing due to the reasonable probability of prejudice to the defendants inherent in conducting an open proceeding. The prejudice to which the County Court was referring was the possibility that massive pretrial publication of the defendants' confessions and incriminating statements would infect prospective jurors with such prejudice against the defendants, conscious or unconscious, that they could not receive a fair trial in Seneca County. (See, People v. Pratt, 27 AD2d 199.) While this possibility certainly exists, the purpose behind the exclusionary order unmasks it as a substitute for a gag order that would otherwise place a direct restraint on the right of the press to publish.

Prior restraint on speech and publication is "the most serious and least tolerable infringement on First Amendment rights" (Nebraska Press Assn. v. Stuart, ____ US____, 96 S. Ct. 2791, 49 L. Ed. 2d 683, 697). "[O]nly the most exigent circumstances warrant the issuance of an order curtailing the right of the press to publish. All other measures within the power of the court to insure a fair trial must be found to be unavailing or deficient" (New York Times v. Starkey, 51 AD2d 60, 64). The reviewing court must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial

news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; (c) how effectively a restraining order would operate to prevent the threatened danger. The reviewing court should then consider whether the record supports the entry of a prior restraint on publication (Nebraska Press Assn. v. Stuart, supra, 49 L. Ed. 2d at 699).

Applying these standards to the order under review we find that the "heavy burden imposed as a condition to securing a prior restraint" has not been met here (Nebraska Press Assn. v. Stuart, supra). Respondent made no findings with regard to the nature and extent of pretrial news coverage. Nor did Judge DePasquale inquire into whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity. And no determination was made as to how effectively the exclusionary order would operate to prevent the threatened danger (Nebraska Press Assn. v. Stuart, supra, 49 L. Ed. 2d at 699-702). The record in the instant case clearly does not support the entry of respondent's restrictive order barring the public and press from the defendants' Huntley hearing. The reasons set forth by the County Court cannot justify the violation of First Amendment rights evident here.

Petitioner has also asserted a due process right to notice and a hearing prior to the entry of exclusionary orders which are directed at the press to prevent the publication of matters prejudicial to the defendant in a criminal proceeding. Such rights have been accorded to the press in cases involving direct prior restraints (New York Times v. Starkey, supra; United States v. Schiavo, 504 F2d 1), and similar rights should be accorded to the press where a trial court

contemplates entering an exclusionary order for the purpose of suppressing pretrial publicity deemed prejudicial to the defendant.

The record shows that the closure order under review was entered specifically to prevent petitioner from disseminating the inherently prejudicial disclosures that inevitably follow from a Huntley hearing. Respondent DePasquale was undoubtedly motivated by a concern that the defendants receive a fair trial in Seneca County, yet the purpose behind the closure order was unquestionably to prevent such information from reaching the eyes and ears of prospective jurors. In this respect the order constituted a prior restraint on petitioner's freedom to publish what transpired during the Huntley hearing. For this very reason respondent's order violated petitioner's First Amendment rights (see, State ex rel. Dayton Newspapers, Inc. v. Phillips, 46 Ohio St. 2d 457, 351 NE2d 127). Judged by the standards enunciated in Nebraska Press Assn. v. Stuart, supra, the closure order entered here cannot withstand petitioner's constitutional challenge.

For the reasons stated, the orders of the County Court should be vacated and the petitioner should be granted immediate access to the stenographic transcript of the pretrial Huntley hearing.

Moule, J.P., Simons, Dillon and Goldman, JJ., concur.

FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA,

JULY TERM, A. D., 1976

STATE OF FLORIDA ex rel. MIAMI HERALD PUBLISHING COMPANY, etc., et al.,

Relators,

vs.

RUSSELL H. MCINTOSH, Circuit Court Judge,

Respondent.

CORRECTED COPY

CASE NO. 48,264

Opinion filed July 30, 1976
Writ of Certiorari to the District Court of Appeal, 4th Dis
~~Case of Original Jurisdiction. Prohibition~~

Parker D. Thomson, Susan W. Diner and Dan Paul of Paul and Thomson, for Relators

Joseph P. Metzger, Michael B. Davis and Norman E. Taplin of Walton, Lantaff, Schroeder, Carson and Wahl, for Respondent

Harold B. Wahl of Wahl and Gable, for Florida Publishing Company, Amicus Curiae

William C. Ballard of Baynard, Lang and Ballard, for Times Publishing Company, Amicus Curiae

Talbot D'Alemberte and Patricia A. Seitz of Steel, Hector and Davis, for Post-Newsweek Stations, Florida, Inc., Amicus Curiae

W. S. Rodgers, Jr. and Ted R. Manry, III of MacFarlane, Ferguson, Allison and Kelly, for The Tribune Company, Amicus Curiae

William G. Mateer of Mateer, Harbert, Bechtel and Phalin; John W. Fleming and Rex Conrad of Fleming, O'Brian and Fleming; and Don H. Reuben, Lawrence Gunnels, Samuel Fifer and James A. Klenk of Kirkland and Ellis, for Gore Newspapers Company and Sentinel Star Company, Amicus Curiae

Dan Paul of Paul and Thomson, for The New York Times Company, Amicus Curiae

Daniel Neal Heller of Heller and Kaplan, for The Miami Daily News, Inc., Amicus Curiae

C. Gary Williams of Ausley, McMullen, McGehee, Carothers and Proctor for Florida Society of Newspaper Editors, Amicus Curiae

BOYD, J.

This cause is before us on petition for certiorari[1] to review the decision of the District Court of Appeal, Fourth District, reported at 321 So.2d 861 (Fla. 4th DCA 1975), which purportedly conflicts with State ex rel. Miami Herald Publishing Co. v. Rose.[2]

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[1] Art. V, § 3(b)(3), Fla. Const.

[2]

The facts of the case as alleged in the pleadings, and as argued both in the briefs and orally are as follows.

Three mortgage brokers and three corporate brokerage firms are charged with "...selling unregistered securities, selling securities while not registered as a securities salesman, securities fraud, grand larceny and conspiracy to sell unregistered securities and to commit grand larceny...." These charges are the first to emerge from the Comptroller's statewide investigation into what he terms a mammoth securities and mortgage fraud within the State. Since this investigation has been the subject of widespread coverage by state and national press, the six criminal defendants joined in a Motion to Control Prejudicial Publicity, which motion was served only on counsel for the State and for the defendants and was heard along with other pre-trial motions. Upon consideration of the motion, argument of counsel, a file of press clippings and the authorities presented by the parties to the criminal action Respondent entered his first order in which he ordered:

> "1. The defendant's Motion to Control Prejudicial Publicity, in order to afford a fair trial of this cause, is hereby granted and the Court orders as follows:
>
> "A. Members of the news media shall not report any testimony presented and/or evidence exhibited in the absence of the jury unless same shall have been admitted in evidence by the Court, or is a public record, or is presented in open court in the presence of the jury;
>
> "B. Defense Counsel, all members and employees of the Palm Beach County State Attorney's Office, all members and employees of the Attorney General's office, members and employees of the Division of Securities, and members and employees of the Office of the Comptroller, and all officials of the State of Florida, including the Comptroller and the Attorney General of the State of Florida, law enforcement officers, subpoenaed witnesses, bailiffs, clerks and other officials in attendance to this Court, shall not give or authorize any extrajudicial statement or interview relating to the trial of this cause or the parties or issues in the trial for dissemination by any means of public communication during the course of this trial, except they may quote from or refer without comment to public records, or testimony or evidence that has been admitted in evidence during the course of this trial.
>
> "2. The intendment of this Order is to prevent publicity of a nature that would tend to adversely affect the rights of the defendants to a fair trial."

On his morning arrival at the courtroom Relator Schwartz, a reporter for Relator newspaper, was instructed to pick up a copy of this order, which he did. That afternoon, Relators sought revocation of Respondent's first order; a hearing was scheduled for the following morning. At that hearing, Relators filed a Motion to Vacate Respondent's first order, supporting their Motion with a memorandum of law. No additional factual support for the first order was submitted. At the conclusion of the hearing, Respondent entered his second order in which he not only denied Relators' Motion on the ground that they had no standing to challenge the first order but he also made the following gratuitous "findings of fact":

> "That there has been a considerable amount of publicity by news media throughout the State, some of which quotes high government officials on the subject matter of this prosecution;
>
> "That it is reasonable to expect that this publicity will continue during the course of this trial; and
>
> "That the continuance of this publicity if it is permitted to include proferred testimony and/or documents or other physical evidence which are inadmissible against the defendants or opinions of public officials, attorneys, court personnel, and other restrained by the contested order constitutes a 'clear and present danger' that the defendants in this prosecution will not receive a fair trial unless the order entered herein be enforced."

On October 15, 1975, immediately after the denial of their Motion, Relators sought expedited review in the District Court of Appeal, Fourth District, by filing a Suggestion for Writ of Prohibition, which Suggestion was denied Per Curiam, with a dissenting opinion on October 17, 1975. The selection of the jury which began October 14, 1975, concluded on Friday, October 17, 1975. The taking of testimony commenced on Monday, October 20, 1975. Thereafter, on October 28th, some eleven days after the decision of the District Court, Petitioners filed for relief in this Court, seeking, among other things, a Stay Order suspending operation of the trial judge's orders. An emergency hearing was set and oral argument heard on

Monday, November 3, 1975. After careful review of the record, we made the following determinations:[3]

> "1. That the Petition for Prohibition, Mandamus and Stay Order is denied.
>
> "2. Pursuant to Section 2(a), Article V, Constitution of Florida, the Court has classified the Petition as a Petition for Conflict Certiorari . . . Relief requested for any other constitutional relief is denied.
>
> "3. [The parties] shall file their briefs on jurisdiction and merits . . . with oral argument . . . to be heard on jurisdiction and merits on November 17th . . . ."

Briefs having been filed by all parties and a multiplicity of amicus curiae and oral argument having been heard, we find that in considering this petition for certiorari we are confronting the monumental task of balancing equally important constitutional rights: the right of a defendant to a fair trial and the right of the public to know facts by way of a free press.

Initially, let us consider the arguments for a "free press" as presented by Petitioners. Any form of prior restraint of expression comes to a reviewing court bearing a heavy presumption against its constitutional validity; therefore, the party who seeks to have such a restraint upheld carries a heavy burden of showing justification for the imposition of such a restraint.[4] While a court is legitimately concerned with preventing prejudicial publicity from poisoning the impartial atmosphere essential to a fair trial, the court's action in restricting the media must relate to the danger sought to be avoided and it must not be unconstitutionally overbroad.[5] For instance, in C.B.S. Inc. v. Young,[6] the court held that prior direct restraints must pose a "clear and present danger" or a "serious or imminent" threat to a protected

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[3] 322 So.2d 544 (Fla. 1975).

[4] New York Times Company v. U.S. and U.S. v. The Washington Post Company, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822; Bantam Books v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).

[5] U.S. v. C.B.S. Inc., 497 F.2d 102 (5th Circuit 1974).

[6] 522 F.2d 234 (6th Circuit 1975).

interest and that such a restraint cannot be upheld if reasonable alternatives are available.[7] In U. S. v. Dickinson, the court observed that before First Amendment freedoms can be abridged, substantive evil must be extremely serious and the degree of imminence extremely high. The standard to be met is that the expression by the press must constitute "an immediate, not merely likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."[8]

It has been recognized in Florida and elsewhere that the news media, even though not a party to litigation below, has standing to question the validity of an order because its ability to gather news is directly impaired or curtailed.[9] This is so, because the public and press have a right to know what goes on in a courtroom whether the proceeding be criminal or civil. A member of the press or newspaper corporation may be properly considered as a representative of the public insofar as enforcement of public right of access to the court is concerned; and the public and press have a fundamental right of access to all judicial proceedings. In determining restrictions to be placed upon access to judicial proceedings, the court must balance the rights and interest of the parties to litigation with those of the public and press.[10] Reporters are plainly free to report whatever occurs in open

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7 465 F.2d 496 (5th Circuit 1972).

8 See Craig v. Harney, 331 U.S. 367, 375, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947); see, also, U.S. v. C.B.S. Inc., supra, Note 5.

9 See C.B.S. Inc. v. Young, supra, and State ex rel. Gore Newspaper Company v. Tyson, 313 So.2d 777 (Fla. 4th DCA 1975)

10 State ex rel. Gore Newspaper Company v. Tyson, supra, Note 1

court through their respective media.[11] A trial is a public event, and there is no special perquisite of the judiciary which enables it to suppress, edit or censor events which transpire in proceedings before it, and those who see and hear what transpired may report it with immunity,[12] subject to constitutional restraints mentioned herein.

Nevertheless, a trial court has the inherent power to control the conduct of the proceedings before it,[13] and it is the trial court's responsibility to protect a defendant in a criminal prosecution from inherently prejudicial influences which threaten fairness of his trial and the abrogation of his constitutional rights.[14] Florida has held already that through admonition to jurors and through sequestration of the jury, a trial judge has ample power to insure a fair trial for a criminal defendant without suppressing First Amendment rights of the news media as regards reporting proceedings.[15]

We now turn our attention to Respondent's arguments upholding his actions as necessary to secure a fair trial for the criminal defendants. Respondent asserts that the Orders before this Court must be considered not only in light of the First Amendment as it relates to freedom of the press, but also in connection with the due process requirements of both the Fifth and Fourteenth Amendments and the provisions of the Sixth Amendment securing a defendant a fair trial.

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11 Estes v. Texas, 381 U.S. 532, 14 L.Ed.2d 543, 85 S.Ct. 1628 (1965); reh.den. 382 U.S. 875, 15 L.Ed.2d 118, 86 S.Ct. 18; Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946).

12 United States v. Dickinson, supra, Note 7.

13 State ex rel. Gore Newspaper Company v. Tyson, supra, Note

14 United States v. Dickinson, supra, Note 7.

15 State ex rel. Miami Herald Publishing Co. v. Rose, supra, Note 2.

In Estes v. Texas[16] the Court stated that "fair trial [is] the most fundamental of all freedoms." In that case the Court went on to say:

> "While maximum freedom must be allowed the press in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process....We have always held that the atmosphere essential to the preservation of a fair trial - the most fundamental of all freedoms - must be maintained at all costs." (emphasis supplied)[17]

The leading case in this area is Sheppard v. Maxwell,[18] in which it was stated:

> "Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the persuasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances."[19]

In United States v. Tijerina[20] the following is found:

> "...The defense argument [that the statements in Sheppard are dicta] necessarily places freedom of speech in a preferred position above fair trial. Some decisions of the Supreme Court place First Amendment rights in a preferred position...This preferred position has never been approved in a case where balance must be had between free speech and fair trial. Indeed, the Court has awarded the preference to fair trial...Estes v. Texas...The order against extrajudicial statements was designed to maintain atmosphere essential to the preservation of a fair trial, 'the most fundamental of all freedoms.'"[21]

In Allegrezza v. Superior Court of Alamedia County[22] trial courts were directed not to accord the press greater rights than are assigned to defendants in criminal proceedings.

Clearly, the essence of this case is reconciliation and application of Federal and State constitutional rights to achieve

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[16] Supra, Note 11.

[17] Id.

[18] 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

[19] Id. at 363

[20] 412 F.2d 661 (10th Circuit 1969).

[21] Id. at 667

[22] 121 Cal. Rptr. 245 (Cal. App. 1975).

both a fair trial and freedom of the press. Those who adopted the Bill of Rights had personally experienced the actions of King George, III, in denying these and other rights. It is reasonable to assume they recognized the interdependence of each provision of the Constitution of the United States upon all other provisions. Without fair trial freedom of the press could not exist, and without freedom of the press fair trials could not be assured. The federal Constitution constitutes a uniform and cohesive umbrella to protect the people against oppression, injustice and tyranny. Since no two criminal trials are exactly alike, each trial judge must apply federal and state interpretations of the Bill of Rights and must balance the rights of free press and fair trial to assure that justice and fairness prevail in each trial. To attain true justice the written law must be seasoned with a proper amount of common sense.

The inconvenience suffered by jurors who are sequestered to prevent exposure to excluded evidence which may be published in the press is a small price to pay for the public's right to timely knowledge of trial proceedings guaranteed by freedom of the press. It is argued that a temporary withholding of news from the public may aid in assuring a fair trial and that if the State and defendant agree to muzzling the press no one else has a right to object. We firmly reject any suppression of news in a criminal trial except in those rare instances such asnational security and where a news report would obviously deny a fair trial as stated above in Federal cases.

Freedom of the press is not, and has never been, a private property right granted to those who own the news media. It is a cherished and almost sacred right of each citizen to be informed about current events on a timely basis so each can exercise his discretion in determining the destiny and security of himself, other people, and the Nation. News delayed is news denied. To be useful to the public,news events must be reported when they occur. Whatever happens in any courtroom directly or indirectly

affects all the public. To prevent star-chamber injustice the public should generally have unrestricted access to all proceedings.

Although freedom of the press belongs to all the people those who gather and distribute news have special concerns which entitle them to notice and a hearing before any trial court enjoins or limits publication of court proceedings. The circumstances may require a summary hearing but reasonable notice under prevailing conditions and a hearing must be had in each instance. The court should serve notice to news reporters present, but no order entered in good faith is invalid for lack of notice to one or more who may be unavailable to receive notice. Announcement from the bench or publication in writing in the courtroom should be adequate.

Limitations placed upon lawyers, litigants and officials directly affected by court proceedings may be made at the court's discretion for good cause to assure fair trials. Muzzling lawyers who may wish to make public statements to gain public sentiment for their clients has long been reocognized as within the court's inherent power to control professional conduct. The constant spotlight of public attention focused upon public officials during litigation makes it imperative that they be more subject to judicial restrictions against inflammatory and prejudicial statements than other persons. With the exception of lawyers, litigants witnesses, jurors and court personnel, the court should limit restrictions against comments to those areas in which clear and present danger of miscarriage of justice might arise from statements affecting or relating to the trial.

In Nebraska Press Ass'n et al. v. Stuart, 44 U.S.L.W. 5149 (June 30, 1976), the United States Supreme Court reviewed an order entered by a trial court in a sensational murder trial. The order, as modified by the Nebraska Supreme Court, restrained the press from publishing accounts of confessions or admissions of the accused and other facts "strongly implicative" of the accused. Although

the order expired by its own terms upon impanelment of the jury which indeed had been impaneled at the time of its decision the Court held the issue of whether the order unconstitutionally impinged on freedom of the press in violation of the First Amendment was not moot since the controversy between the parties is capable of repetition, yet evading review. The Court then held that the heavy burden imposed as a condition to securing a prior restraint was not met in this case for several reasons, among them, that there was no showing that alternative measures might have protected the accused's rights, that there existed doubt that the accused would have been protected by the prior restraint and that to the extent the order prohibited publication adduced at an open preliminary hearing it violated the principle, enunciated in Sheppard, that the press may report events that transpire in the courtroom. Although the trial in this case is over the issue of violation of the guarantee of freedom of the press is not moot, just as it was not moot in Stuart, and although the prior restraint in Stuart is not precisely the same as it is here, the accommodation of the two constitutional guarantees at which we arrive is strengthened by the holding in Stuart.

To conclude, we issued a writ of certiorari and exercised jurisdiction herein because the decision of the District Court of Appeal, Fourth District, reported 321 So.2d 861 (Fla. 4th DCA 1975), conflicts with State ex rel. Miami Herald Publishing Co. v. Rose.[23] We have examined the facts and the law; we conclude that Rose, supra, correctly states the law. Accordingly, the decision of the District Court in this cause is quashed.

It is so ordered.

OVERTON, C.J., ADKINS and HATCHETT, JJ., Concur
ROBERTS, J., Concurs in Conclusion
ENGLAND, J., Concurs with an opinion
SUNDBERG, J., Concurs with an opinion

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[23] Supra, Note 2.

ENGLAND, J., concurring.

I concur in the result achieved by the majority's opinion, and in the procedural suggestions formulated by Mr. Justice Sundberg.

This case is really quite easy, it seems to me, since it presents for our review a form of court order least capable of withstanding constitutional scrutiny - one which imposes a prior restraint on reporting a public trial without notice to the media or any opportunity to be heard, and without any factual foundation demonstrating a need for the restraint. See Nebraska Press Ass'n. v. Stuart, ____U.S.____,____,44 L.W. 5149, 5159 (Brennan, J., concurring).

SUNDBERG, J., concurring.

While I concur in the thoughtful opinion by Mr. Justice Boyd, for guidance of the bench, bar and media, I would suggest that it is appropriate to be more precise with respect to procedures to be employed in accommodating the First and Sixth Amendment guarantees discussed by the majority.

Although counsel for relators makes a very persuasive historical argument against any prior restraints upon the press in reporting judicial proceedings, the decisions of the United States Supreme Court and of this Court to date have not accepted his thesis. In fact, decisions of the federal circuit courts of appeal have assumed that there is some limitation upon the right of the press to publish some portions of judicial proceedings. See, for example, United States v. Tijerina, 412 F.2d 661 (10th Cir. 1969). Consequently, until such time as the United States Supreme Court holds that the rights under the First and Sixth Amendments are not correlative we must establish procedural parameters to accommodate the force and operation of the respective rights guaranteed by those Amendments when they come into conflict. I subscribed to the proposition that an actual confrontation between these two essential concepts - freedom of the press and the right of a criminal defendant to a fair trial - need occur very infrequently because there are numerous means within the power of the court, such as explicit instructions to the jurors and sequestering, to insure a fair trial short of imposing a restraint on the press. Recourse to these measures, in my judgment, must be totally exhausted and found wanting before consideration be given to an order directly restraining the press in publishing events occurring in open court.

So as to facilitate review by the appropriate appellate tribunal, the trial court should explicitly set forth the reasons why the customary means available to the court to protect against the influence of prejudicial trial publicity are insufficient to provide the defendant a fair trial. In its deliberations the trial court must

conclude not only that the alternative measures available are not sufficient, but also that there is a "clear and present danger" or "serious and imminent threat" that publication will preclude the fair administration of justice in the cause. See Schenck v. United States, 249 U.S. 74, 39 S.Ct. 247, 63 L.Ed. 470 (1919); United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972); and Chicago Council of Lawyers v. Baur, 522 F.2d 242 (7th Cir. 1975).

As suggested by the report of the American Bar Association's Legal Advisory Committee on Fair Trial and Free Press, 62 A.B.A.J. pp. 63-64, persons representing the news media are best equipped to provide the input concerning the First Amendment ramifications of any action which effectively restricts the flow of information to the public. Accordingly, fair notice and an opportunity to be heard should be afforded to the news media whenever an order restraining publication is contemplated by the court. As further suggested by the report of the A.B.A. committee, whenever possible the hearing should be held sufficiently in advance of the trial to permit review of the court's order by interested parties before the matter becomes moot. A corollary of this procedure should be the willingness of representatives of the media to participate in the review on appeal of any such order when restraint is denied at the urging of the media.

It is clear to me that the action of the trial court in each of these consolidated proceedings failed procedurally to measure up to the mandate of the First Amendment when brought into accord with that of the Sixth Amendment. However, this is not stated critically because as indicated by Mr. Jack A. Landau in his article, "The Challenge of the Communications Media"[1] the progeny of Sheppard v. Maxwell, 384 U.S.333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), has brought an abundance of confusion to this area of the law. It ill behooves us to criticize the trial judge who heretofore has been placed in the delicate and emotionally charged situation of balancing two of our most precious constitutional guarantees with little real direction from the myriad of cases on the subject.

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1. 62 A.B.A.J. 55 (1976).